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NTSB Order No. EA-4313

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of January, 1995

JOHN G. RAFTER, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	)	Docket No. 202-EAJA-SE-13510

OPINION AND ORDER

Applicant has appealed the initial decision of Administrative Law Judge William E. Fowler, Jr. denying applicant's request for attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504. The Administrator has replied, arguing that an award is unwarranted and, secondarily, that for various reasons the recovery sought is excessive. We deny the appeal.

This EAJA application is the outgrowth of extensive proceedings brought by the Administrator against applicant personally and Echo, Inc., the helicopter company of which he was President, Director of Operations, and Director of Maintenance. On November 19, 1993, applicant piloted an Echo air-ambulance flight from Portland, ME to Ellsworth, ME, to pick up a burn patient.[1] During the return flight to Portland with the patient, the weather worsened, with instrument meteorological conditions prevailing requiring IFR[2] flight. Applicant was not qualified for IFR flight, and the helicopter's operating specifications directed only VFR[3] flight. Respondent, rather than landing as soon as possible, continued the flight, climbing to a higher altitude in an attempt to stabilize the aircraft. Tr. Vol. II at 85. Applicant contacted air traffic control (ATC) and obtained an IFR clearance, from which he later deviated. He did not declare an emergency, nor did he advise that his aircraft was not IFR-certificated or that he was not IFR-current. Primarily as a result of the wind and turbulence, the flight back took greater fuel than expected. While still enroute, the helicopter ran out of fuel and crashed in Casco Bay. Applicant was the only survivor.

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[1]Two air ambulance personnel employed by a company of which applicant was the major shareholder were on the aircraft to tend to the patient.

[2]Instrument Flight Rules.

[3]Visual Flight Rules.

The Administrator charged applicant with numerous violations of the Federal Aviation Regulations related to unqualified flying, flying the helicopter in violation of its operating limitations, failing to familiarize himself sufficiently of flight conditions, deviating from an ATC instruction, flying without a second-in-command in IFR conditions, and failing to have sufficient fuel for either VFR or IFR conditions.[4] (Echo was also charged with most of these violations.) The Administrator sought revocation of Echo's air carrier certificate and applicant's commercial pilot certificate.

The law judge affirmed all but the allegation that applicant took off from Portland without sufficient fuel for a VFR flight (14 C.F.R. 135.209), and affirmed the sanction of revocation as to both applicant and Echo. On appeal, we affirmed the law judge's conclusions except to the extent he found a violation of § 135.5 on the outbound flight.[5] We affirmed all findings and sanction regarding Echo, holding that:

> We think that a serious operational misjudgment that may be excusable as an aberrant occurrence for an individual pilot

[4]Applicant was charged with violating 14 C.F.R. 61.57(e), 91.9(a), 91.13(a), 91.103, 91.123(a), 91.167, 135.5, 135.101, 135.181(a)(1), 135.209(b), and 135.297(a). These provisions are reproduced in our decision, Administrator v. Echo, Inc. & Rafter, NTSB Order EA-4150 (1994) at footnote 3.

[5]Our decision inadvertently suggests that we dismissed the § 135.5 charge in its entirety. The text of our opinion makes clear, however, that we rejected that charge only as it was brought against applicant's flight from Portland to Ellsworth. (There would have been no need to discuss the availability of the emergency affirmative defense had we dismissed the § 135.5 charge as to both the outbound and inbound flights.)

> becomes indefensible when that pilot is, also, the person in control of a carrier's operations, for an air carrier whose management does not adhere unflinchingly to all relevant operational standards does not meet its obligation to provide the highest degree of safety. We think that when respondent Rafter, with full knowledge that neither he nor his aircraft should be operating under IFR surreptitiously, chose to disregard, contrary to numerous requirements, his company's operations specifications and manual by proceeding with a flight he should have ended, he demonstrated that respondent Echo lacks the compliance disposition expected and demanded of an air carrier.

Id. at 13. We found as to applicant that he had demonstrated "exceptionally poor judgment" (id. at 12), but that his decision to proceed with a flight he should have terminated did not warrant a conclusion that he was not qualified to hold an airman certificate (the standard for the revocation the Administrator sought). We imposed, instead, a 180-day suspension of applicant's commercial pilot certificate.

The law judge rejected applicant's EAJA request because he concluded that the Administrator had met his burden of proving that his prosecution had been substantially justified.[6] On appeal, applicant argues that the FAA's most serious allegations were overturned by the Board for lack of evidence. Applicant equates the Board's partial rejection of the Administrator's complaint as proof that the Administrator was not substantially justified on those points.

In deciding whether the Administrator was substantially justified, the relevant inquiry is whether the government's case

[6]The law judge did not make a specific finding that applicant was a prevailing party. In view of our conclusion that the application should be denied for other reasons, we need not decide this issue.

is "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988). "To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory." Application of US Jet, NTSB Order EA-3817 (1993), slip op. at 2, citations omitted.

Although we stated in our prior decision on the merits that the Administrator had alleged conduct that was considerably more serious than we thought was proven by a preponderance of the evidence, applicant's lack of care cannot be minimized, nor does our dismissal of 1 1/2 charges (if our decision can be so measured) outweigh the fact that the Administrator alleged and proved in connection with just one flight numerous violations so serious as to warrant a 180-day suspension.

Applicant claims that we are obliged to review whether each of the Administrator's allegations was substantially justified and award fees if not.[7] We are not convinced that we are obliged to parse this case as applicant would have us. In I.N.S. v. Jean, 496 U.S. 154, 110 S.Ct. 2316, 2320 (1990), the Supreme Court declined to require proof of substantial justification on the merits and on the EAJA application. In broad language with

[7]Despite the Administrator's success on numerous charges, the applicant seeks all of his attorney fees and expenses. He offers no legal support for such a result.

potential application to the question before us, the Court noted that "the EAJA -- like other fee-shifting statutes -- favors treating a case as an inclusive whole, rather than as atomized line-items." Since then, and more pertinent here, the court in Roanoke River Basin Association v. Hudson, 991 F.2d 132, 139 (4th Cir. 1993), stated:

> While we do not construe the court's statement [in Jean] to mean that we may look only to the government's macrocosmic position before or during litigation to determine whether it is substantially justified, we do rely on Jean as directing a more broadly focused analysis that would reject the view that any unreasonable position taken by the government in the course of litigation automatically opens the door to an EAJA fee award. Accordingly, we conclude that when determining whether the government's position in a case is substantially justified, we look beyond the issue on which the petitioner prevailed to determine, from the totality of the circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation. In doing so, it is appropriate to consider the reasonable overall objectives of the government and the extent to which the alleged governmental misconduct departed from them.

The court continued:

> Thus, a more egregious example of misconduct might, even if confined to a narrow but important issue, taint the government's "position" in the entire case as unreasonable, whereas a totally insupportable and clearly unreasonable position by the government on an inconsequential aspect of the litigation might not. Similarly, a broader government position that, considered in a vacuum, would not be clearly egregious might still, in the overall context of the case, constitute an unreasonable position because of its impact. Although an unreasonable stance taken on a single issue may thus undermine the substantial justification of the government's position, that question can be answered only by looking to the stance's effect on the entire civil action.

Under such an analysis, there seems little question that the Administrator should be found to have been substantially justified. The case as a whole was well-grounded and the

majority of charges proven. Significantly, the Administrator alleged and proved that applicant continued to fly a helicopter, with passengers, into weather in which neither he nor the machine were qualified, and to proceed to the point of fuel exhaustion, whereupon the helicopter crashed and the passengers died. These actions violated numerous regulations. We will not find the Administrator unreasonable in law for choosing to present the case as one where respondent should have made different choices from the beginning (i.e., in choosing to take off when the weather was borderline VFR), rather than limiting his case to the clear violations of the return trip.

We have recognized that EAJA awards are intended to dissuade the government from pursuing "weak or tenuous" cases. The statute is intended to caution agencies carefully to evaluate their cases, not to prevent them from bringing those that have some risk. Catskill Airways, Inc., 4 NTSB 799 (1983). Indeed, we found that the Administrator did not "adequately prove" the § 135.5 charge regarding the outbound flight, not that it had absolutely no evidentiary basis. We do not think that EAJA intended to compensate in such a case.

Applicant suggests that a partial award is compelled by Alphin v. NTSB, 839 F.2d 817 (D.C. Cir. 1988). We do not think that Alphin controls. In that case, the court found a partial award appropriate based on the FAA continuing to litigate a position that could no longer be considered reasonable -- an issue not before us here. We acknowledge, nevertheless, that

Cinciarelli v. Reagan, 729 F.2d 801 (D.C. Cir 1984), cited in Alphin, contains dicta that supports applicant's position. In Cinciarelli, the court authorized partial recovery after finding that the government acted unreasonably in pursuing one of two legal theories of the case. The court concluded that the costs of defending against that theory should be recoverable.

We are not convinced, however, that Cinciarelli readily translates to every case where a count in the complaint or one of numerous allegations of law or fact is not reasonably brought. And, we read S&H Riggers & Erectors, Inc. v. OSHRC, 672 F.2d 426 (5th Cir. 1982), to hold the opposite (concluding that, when one of three legal arguments prevails, the government is substantially justified). There may well be cases where division of the substantial justification analysis is logical, and fee apportionment appropriate, but we do not see it here.[8]

[8]We have purposely not let our analysis be swayed by the numerous practical difficulties (some of which the Administrator notes in his reply here) attendant in attempts to apportion fees to "atomized line items." We do not think, however, that the practicalities can be ignored.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. Our prior decision, NTSB Order EA-4150, is clarified as set forth in this opinion; and

3. The initial decision denying EAJA fees and expenses is affirmed.

HALL, Chairman, HAMMERSCHMIDT and FRANCIS, Members of the Board, concurred in the above opinion and order.